

REMARKS

By this Amendment, Applicants have amended the specification to correct typographical errors and claims 24-33, 36-39, 42, 43, 46, and 47. Claims 1-23 were previously canceled without prejudice or disclaimer of their subject matter. The amendments to the specification and claims 24-33, 36-39, 42, 43, 46, and 47 are fully supported by the originally-filed application. No new matter has been introduced. Claims 24-47 remain pending and under examination.

Office Action

In the Office Action, the Examiner took the following actions:

- (a) requested correction of informalities in the specification;
- (b) objected to claims 33 and 43 because of alleged informalities;
- (c) rejected claims 24-47 under 35 U.S.C. § 101 as allegedly being directed to non-statutory subject matter;
- (d) rejected claims 24, 27, 30-32, 36, 39, 40-42, and 46 under 35 U.S.C. § 103(a) as allegedly being unpatentable over U.S. Patent No. 6,067,412 ("Blake") in view of U.S. Patent No. 7,269,643 B2 ("Spaid");
- (e) rejected claims 25, 26, 37, and 38 under 35 U.S.C. § 103(a) as allegedly being unpatentable over Blake in view of Spaid and in further view of U.S. Patent No. 6,973,490 B1 ("Robertson");
- (f) rejected claims 28 and 29 under 35 U.S.C. § 103(a) as allegedly being unpatentable over Blake in view of Spaid and in further view of U.S. Patent No. 6,327,677 B1 ("Garg");
- (g) rejected claims 33, 35, 43, 45, and 47 under 35 U.S.C. § 103(a) as allegedly being unpatentable over Robertson in view of Blake; and
- (h) rejected claims 34 and 44 under 35 U.S.C. § 103(a) as allegedly being unpatentable over Robertson in view of Blake and in further view of U.S. Patent Application Publication No. 2008/0034086 A1 ("Castelli").

Applicants respectfully traverse the objection and rejections.

Regarding the Specification

The Office Action states that “[t]he specification has not been checked to the extent necessary to determine the presence of all possible minor errors. Applicant’s cooperation is requested in correcting any errors of which applicant may become aware in the specification.” Office Action, p. 2. In response, Applicants have amended the specification as indicated herein.

Objection to Claims 33 and 43

The Office Action objected to claims 33 and 43 for alleged informalities. In response, Applicants have amended claims 33 and 43 in line with the Office Action’s suggestions. Applicants therefore respectfully request withdrawal of the objection.

Rejection of Claims 24-47 under 35 U.S.C. § 101

Applicants respectfully traverse the rejection of claims 24-47 under 35 U.S.C. § 101 as allegedly being directed to non-statutory subject matter. In response to this rejection, and without conceding to the Office Action’s allegations regarding alleged non-statutory matter, Applicants have amended claims 24, 27, 28, 30-33, 36, 43, 46, and 47 to recite a method implemented using a computer system, a system comprising at least one computer system, and a computer readable medium, respectively. These amendments overcome the 35 U.S.C. § 101 rejection, and accordingly Applicants respectfully request its withdrawal.

Rejection of Claims 24, 27, 30-32, 36, 39, 40-42, and 46 under 35 U.S.C. § 103(a)

Applicants request reconsideration and withdrawal of the rejection of claims 24, 27, 30-32, 36, 39, 40-42, and 46 under 35 U.S.C. § 103(a) as allegedly being unpatentable over Blake in view of Spaid. The Office Action has not properly resolved the *Graham* factual inquiries, the proper resolution of which is the requirement for establishing a framework for an objective obviousness analysis. See M.P.E.P. § 2141(II), citing to *Graham v. John Deere Co.*,

383 U.S. 1, 148 USPQ 459 (1966), as reiterated by the U.S. Supreme Court in *KSR International Co. v. Teleflex Inc.*, 550 U.S. ___, 82 USPQ2d 1385 (2007).

In particular, the Office Action has not properly determined the scope and content of the prior art. Specifically, Blake and Spaid do not teach or suggest what the Office Action attributes to them. In addition, the Office Action has not properly ascertained the differences between the claimed invention and the prior art, at least because it has not interpreted the prior art and considered both the invention and the prior art as a whole. See M.P.E.P. § 2141(II)(B).

In contrast to the allegations in the Office Action at pp. 6-9, Blake and Spaid, taken alone or in combination, do not teach or suggest at least Applicants' claimed "[a] method, implemented using a computer system, for evaluating download performance of web pages accessible via a network," as recited in claim 24.

Blake discloses "a system and method for determining a workload placed on a target computer system during execution of a specified computer program." Blake, col. 2, lines 26-28. Blake discloses using a model to determine "the most probable workload for a set of actual performance measurements." *Id.*, col. 4, lines 40-42. Once the most probable workload is determined, "the adapted model is used to predict the resulting performance of various changes to the configuration of the target computer system." *Id.*, col. 4, lines 62-65. It appears that Blake does not even disclose a "web page," which was essentially admitted by the Office Action. See Office Action, p. 7, stating "Blake et al. does not specifically disclose web pages or defining/selecting [] set of web pages." Blake's disclosure is not related to a "method, implemented using a computer system, for evaluating download performance of web pages accessible via a network," as recited in claim 24. Furthermore, Blake does not teach or suggest,

among other things, at least “defining a set of sample web pages [and] measuring said set of download performance parameters for said sample web pages,” as recited in claim 24.

The Office Action relies on Spaid to allegedly cure these deficiencies of Blake. The Office Action alleges that “Spaid discloses defining/selecting a set of web pages (abstract, column 2[,] lines 54-61),” and contends that “it would have been obvious to one of ordinary skill in the art [at] the time the invention was made to incorporate defining/selecting a set of web pages, at taught by, Spaid into the system of Blake et al. for the purpose of measuring the quality of web pages (Spaid; abstract).” Office Action, p. 7. Applicants respectfully disagree.

Contrary to the Office Action’s allegations, Spaid fails to cure Blake’s deficiencies. Instead, Spaid discloses a “Web site quality measurement system and method.” Spaid, Abstract. The method of Spaid includes “logging visitor data and session data for a Web site viewing session,” and individually evaluating the logged data based upon pre-established ranking criteria. *Id.*, col. 2, lines 54-61. Although Spaid discloses “Web site pages” (e.g., at col. 2, line 57), the method of Spaid is merely “for measuring the quality of individual Web site visits for individual visitors.” *Id.*, col. 2, lines 51-52 (emphasis added). Spaid therefore fails to teach or suggest at least Applicants’ claimed “defining a set of sample web pages [and] measuring said set of download performance parameters for said sample web pages,” as recited in claim 24.

Furthermore, there would not have been any motivation for one of ordinary skill in the art to combine Blake, which is related to “determining a cost-effective configuration for a target computer system that executes a set of target computer program” (Blake, col. 3, lines 48-51), with Spaid, which is related to “measuring the quality of individual Web site visits for individual visitors” (Spaid, col. 2, lines 51-52). Furthermore, even assuming Blake and Spaid were combined, the hypothetical combination would not have taught or suggested each and every

element of claim 24, and thus would not have been predictable. Applicants submit that the Office Action's analysis of the prior art references and the suggested combination is clearly based on impermissible hindsight. *See* M.P.E.P. §§ 2141.01(III) and 2142.

The Office Action has therefore neither properly determined the scope and content of the prior art nor properly ascertained the differences between the prior art and the claimed invention. For at least the foregoing reasons, the subject matter of claim 24 is not rendered obvious by the cited references. Thus, claim 24 should be allowable over the cited references. Although of different scope, independent claim 36 recites features similar to those recited in claim 24, and should be allowable for at least the same reasons as claim 24. Dependent claims 27, 30-32, 39, 40-42, and 46 also should be allowable at least by virtue of their respective dependence from base claim 24 or 36. Accordingly, Applicants respectfully request reconsideration and withdrawal of the 35 U.S.C. § 103(a) rejection.

Rejection of Claims 25, 26, 37, and 38 under 35 U.S.C. § 103(a)

Applicants request reconsideration and withdrawal of the rejection of claims 25, 26, 37, and 38 under 35 U.S.C. § 103(a) as allegedly being unpatentable over Blake in view of Spaid, and further in view of Robertson.

As discussed in the previous section, Blake and Spaid, whether taken alone or in combination, do not render obvious Applicants' independent claims 24 and 36, at least because the Office Action has neither properly determined the scope and content of the prior art nor properly ascertained the differences between the prior art and the claimed invention. In particular, Blake and Spaid, whether taken alone or in combination, do not teach or suggest each and every element of independent claims 24 and 36.

Robertson does not cure the deficiencies of Blake and Spaid. Robertson discloses a system for internet performance monitoring and analysis, which utilizes at least one agent connected to a computer network and adapted to collect the object-level data and to measure the access parameters. Robertson, Abstract. Robertson discloses measuring various data elements required to accurately represent the end-user experience, such as connection time, throughput, etc. See Robertson, col. 4, line 61 through col. 5, line 20. Robertson also teaches a “[t]otal time 62 [being] the sum of the DNS, Connect, Request, Response, Download, and Disconnect times (in seconds).” Robertson, col. 7, lines 54-56. Although Robertson teaches measuring various data elements associated with visiting a web page, such as DNS lookup time, connection time, throughput, etc., Robertson fails to teach or suggest at least Applicants’ claimed “defining a set of sample web pages [and] measuring said set of download performance parameters for said sample web pages,” as recited in independent claim 24, and similar features recited in independent claim 36, which are also not taught or suggested by Blake and Spaid.

Thus, Robertson fails to cure the deficiencies of Blake and Spaid. Blake, Spaid, and Robertson, whether taken alone or in any combination, do not teach or suggest each and every element of independent claims 24 and 36. Therefore, independent claims 24 and 36 should be allowable over the cited references, and dependent claims 25, 26, 37, and 38 also should be allowable at least by virtue of their respective dependence from base claim 24 or 36. Accordingly, Applicants respectfully request reconsideration and withdrawal of the 35 U.S.C. § 103(a) rejection.

Rejection of Claims 28 and 29 under 35 U.S.C. § 103(a)

Applicants request reconsideration and withdrawal of the rejection of claims 28 and 29 under 35 U.S.C. § 103(a) as allegedly being unpatentable over Blake in view of Spaid, and further in view of Garg.

As discussed previously herein, Blake and Spaid, whether taken alone or in combination, do not render obvious Applicants' independent claims 24 and 36, at least because the Office Action has neither properly determined the scope and content of the prior art nor properly ascertained the differences between the prior art and the claimed invention. In particular, Blake and Spaid, whether taken alone or in combination, do not teach or suggest each and every element of independent claim 24.

Garg does not cure the deficiencies of Blake and Spaid. Garg discloses a system for monitoring a network environment by collecting recent data associated with operations of the network environment, analyzing the collected data, and determining problems or potential problems based on the analysis. See Garg, Abstract. However, Garg fails to teach or suggest at least Applicants' claimed "defining a set of sample web pages [and] measuring said set of download performance parameters for said sample web pages," as recited in independent claim 24, which are also not taught or suggested by Blake and Spaid.

Thus, Garg fails to cure the deficiencies of Blake and Spaid. Blake, Spaid, and Garg, whether taken alone or in any combination, do not teach or suggest each and every element of claim 24. Therefore, independent claim 24 should be allowable over the cited references, and dependent claims 28 and 29 also should be allowable at least by virtue of their respective dependence from base claim 24. Accordingly, Applicants respectfully request reconsideration and withdrawal of the 35 U.S.C. § 103(a) rejection.

Rejection of Claims 33, 35, 43, 45, and 47 under 35 U.S.C. § 103(a)

Applicants request reconsideration and withdrawal of the rejection of claims 33, 35, 43, 45, and 47 under 35 U.S.C. § 103(a) as allegedly being unpatentable over Robertson in view of Blake.

Claim 33 recites, in part, a “method, implemented using a computer system, for evaluating download performance of web pages accessible via a network.” In rejecting claim 33, the Office Action referenced col. 4, lines 37-60, and col. 5, lines 17-18 of Robertson. See Office Action, pp. 11-12. As discussed previously herein, Robertson discloses a real-time internet performance monitoring system. See Robertson, Abstract. Robertson teaches measuring various data elements required to accurately represent the end-user experience, such as connection time, throughput, etc. *Id.*, col. 4, line 61 through col. 5, line 20. Robertson also teaches a “[t]otal time 62 [being] the sum of the DNS, Connect, Request, Response, Download, and Disconnect times (in seconds).” *Id.*, col. 7, lines 54-56. However, despite its teaching of measuring various times, Robertson does not teach or suggest “at least one first factor determined analytically on the basis of network (*b*, *l*) and web page (*n*, *d*, *h*) parameters,” as recited in claim 33 (emphasis added).

Further, as admitted by the Office Action, Robertson also “does not specifically disclose a second factor being a function of an optimisation parameter (λ).” Office Action, p. 12. Therefore, Robertson does not teach or suggest “evaluating the sum of at least one first factor determined analytically on the basis of network (*b*, *l*) and web page (*n*, *d*, *h*) parameters; and a second factor being a function of an optimisation parameter (λ),” as recited in claim 33 (emphases added).

Despite the Office Action’s allegation that Blake discloses “a factor being a function of an optimization parameter (λ)” (Office Action, p. 12), with which Applicants do not necessarily

agree, Blake still does not teach or suggest at least “evaluating the sum of at least one first factor determined analytically . . . and a second factor . . . ” as recited in claim 33 (emphases added).

Thus, Blake fails to cure the deficiencies of Robertson. Robertson and Blake, whether taken alone or in combination, do not teach or suggest each and every element of claim 33. Thus, independent claim 33 should be allowable over the cited references. Although of different scope, independent claim 43 recites features similar to those recited in claim 33, and should be allowable for at least the same reasons as claim 33. Dependent claims 35, 45, and 47 also should be allowable at least by virtue of their respective dependence from base claim 33 or 43. Accordingly, Applicants respectfully request reconsideration and withdrawal of the 35 U.S.C. § 103(a) rejection.

Rejection of Claims 34 and 44 under 35 U.S.C. § 103(a)

Applicants request reconsideration and withdrawal of the rejection of claims 34 and 44 under 35 U.S.C. § 103(a) as allegedly being unpatentable over Robertson in view of Blake and further in view of Castelli.

Applicants first incorporate the reasoning presented herein against Robertson and Blake, and note the Office Action admitted that “Robertson et al. as modified by Blake et al. does not specifically disclose said second factor is a function of hyperbolic type.” Office Action, p. 13.

Second, Applicants note that Castelli does not qualify as prior art against the present application. The present application was filed as a PCT application on April 30, 2003, designated the United States, and entered the national stage in the United States on October 27, 2005. Therefore, the effective U.S. filing date of the present application is the PCT filing date, April 30, 2003, not the date it entered national stage in the United States. Castelli was filed as a PCT application on June 30, 2004, designated the United States, and was published in English by

WIPO on January 12, 2006. Therefore, the earliest U.S. filing date of Castelli, if it did qualify as prior art, is its PCT filing date of June 30, 2004. However, this date is later than the effective U.S. filing date, April 30, 2003, of the present application. Therefore, Castelli does not qualify as prior art, whether under §§ 102(a), (b), or (e), or § 103(a), against the present application and should be removed as a reference. Dependent claims 34 and 44 should therefore be allowable at least by virtue of their respective dependence from base claim 33 or 43. Accordingly, Applicants respectfully request reconsideration and withdrawal of the 35 U.S.C. § 103(a) rejection.

Conclusion

Applicants request reconsideration and withdrawal of the objection and rejections. Pending claims 24-47 are in condition for allowance, and Applicants request a favorable action.

The Office Action contains statements reflecting characterizations of the related art and the claims. Regardless of whether any such statement is identified herein, Applicants decline to automatically subscribe to any statement or characterization in the Office Action.

If there are any remaining issues or misunderstandings, Applicants request the Examiner telephone the undersigned representative to discuss them.

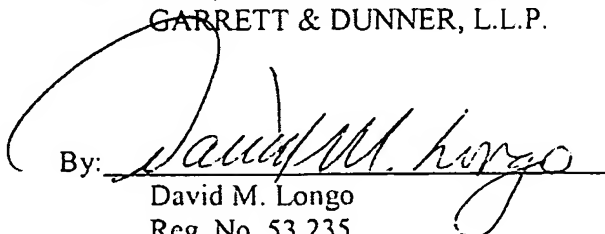
Please grant any extensions of time required to enter this response and charge any additional required fees to Deposit Account 06-0916.

Respectfully submitted,

FINNEGAN, HENDERSON, FARABOW,
GARRETT & DUNNER, L.L.P.

Dated: June 16, 2009

By:


David M. Longo
Reg. No. 53,235

/direct telephone: (571) 203-2763/